for distilling liquor. Section 17(1) of the Excise Act makes it an offence to keep or have in one's possession any still etc.

Held: it was not an offence under section 17(1) of the Excise Act, 1961, to have control, short of possession, of a still and therefore the conviction on this charge must be quashed.

Cases referred to:—

(1) *Bank of New South Wales* v. *The Commonwealth* (1948), 76 C.L.R. 1, at p. 385.

(2) *Dollfus Meig et Cie* v. *Bank of England* [1950] 1 Ch. 333, at p. 359.

CRIMINAL APPEAL.

S. Y. Chan for the appellant.

Abdul Hamid bin Azmi (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye F.J.: The appellant was convicted in the Sessions Court at Kuala Kubu on the following charges:

(1) "That you Pan Kok Wah at about 11.50 a.m. on 5.11.1965 at house No. 201, New Village, Kalumpang, Selangor not being a person licenced under section 16(1) or exempted from licencing under section 16(2) or 17(4) of the Excise Act, No. 34 of 1961, knowingly had in your control apparatus for distilling dutiable goods, to wit, one complete still, thereby committing an offence under section 17(1) and punishable under section 74 of the said Act.

(2) That you Pan Kok Wah at the same time, date and place did have in your control goods, to wit, 1 bucket, 1 acid jar and 4 bottles containing 4½ gallons intoxicating liquor on which the Excise duty amounting to $66.17 leviable by law has not been proved to have been paid, thereby committing an offence under section 73(1)(a) of the Excise Act, No. 34 of 1961 and punishable under section 73(1)(i) of the said Act."

He was sentenced to a fine of $1,000 on the first charge, in default one year's imprisonment, and on the second charge to a fine of $700, in default six months imprisonment. He now appeals against his convicton and sentence.

At the outset I took the point, which both the president and counsel for the appellant appeared to have overlooked, that section 17(1) of the Excise Act, 1961 only makes it an offence knowingly to keep or have in one's possession any still etc. It is not an offence under section 17(1) knowingly to have control, short of possession, of a still. By contrast, section 73(1)(a) speaks of "possession, custody or control." Hence manifestly the appellant had been wrongly convicted, under the first charge, of contravening a provision in section 17(1) which is non-existent.

The distinction between "possession" and "control" is unmistakable. "Control", said Dixon J. (as he then was) in *Bank of New South Wales* v. *The Commonwealth*,[1] is "an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than 'restraint', something equivalent to 'regulation'." In *Dollfus Meig et Cie* v. *Bank of England* [2] Somervell L.J. said that "control would . . . cover the right to tell the possessor what is to be done with the property."

The learned president therefore was in error in thinking that control is synonymous with possession. I accordingly allow the appeal on the first charge and quash the conviction. The appeal on the second charge, being withdrawn by counsel, is dismissed.

Order accordingly.

Solicitors: *Heng, Chen & Co.*

PACIFIC ENGINEERING LTD. v. HAJI AHMAD RICE MILL LTD.

[O.C.J. (Gill J.) April 7, 1966]

[K.L. — Civil Suit No. 754 of 1963]

Tort — Nuisance — Injunction to restrain nuisance — Public nuisance — Claim for damages — Specific Relief (Malay States) Ordinance, 1951, s. 52.

The plaintiff brought an action for an injunction to restrain the defendants from (a) burning rice husks in the compound of their premises; (b) bringing or permitting to remain on their premises rice husks to such quantity and in such manner as to cause a danger from fire to the plaintiff's premises; and (c) dumping or permitting to be dumped on their premises rice husks in such manner that by being carried by wind or otherwise to the plaintiff's premises they cause injury to the plaintiff's property or their employee, invitees and servants. There is also a claim for damages.

Held: (1) the plaintiffs have produced ample evidence to show injury to property and interference with personal comfort caused by the smoke, ashes, dust and rice husks which emanate from the defendant's premises and that these constitute a nuisance in law;

(2) in the circumstances of this case the plaintiffs were entitled to damages and and injunction against the defendants.

Cases referred to:—

(1) *Vanderpant* v. *Mayfair Hotel Co. Ltd.* [1930] 1 Ch. 138, 153.

(2) *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, 913.

(3) *Tipping* v. *St. Helen's Smelting Co.* (1865), L.R. 1 Ch. App. 66.

(4) *Lambton* v. *Mellish, Lambton* v. *Cox* [1894] 3 Ch. 163.

(5) *Rapier* v. *London Tramways Co.* [1893] 2 Ch. 588.

CIVIL SUIT.

S. D. K. Peddie (*James Puthuchery* with him) for the plaintiffs.

Eugene Lye for the defendants.

Cur. Adv. Vult.

Gill J.: This is an action for an injunction to restrain the defendants and their agents from (a) burning rice husks in the compound of their premises, (b) bringing or permitting to remain on their premises rice husks in such manner as to cause a danger from fire to the plaintiffs' premises and (c) dumping or permitting to be dumped on their premises rice husks

in such manner that by being carried by wind or otherwise to the plaintiff's premises they cause injury to the plaintiff's property or their employees, invitees and servants. There is also a claim for damages.

The plaintiffs' premises are situate at Road 217, Petaling Jaya. Directly behind their premises are the premises of Lim Seng Rice Mill with a railway reserve separating the two properties. To the left of and adjoining their premises, as one faces Jalan 217, are the premises of Selangor Rice Mill, and directly behind the premises of the Selangor Rice Mill, with a continuation of the same railway reserve in between, are the premises of Haji Ahmad Rice Mill Limited, the defendants. The locality is shown in detail in a plan which was put in evidence at the trial.

The front portion of the plaintiffs' building consists of the office block which is virtually sealed off from the remainder of the building which consists of their workshop projecting behind the office block in the direction of the areas occupied by Lim Seng and Haji Ahmad Rice Mills. The workshop is completely walled off on all sides with the exception of approximately 3 feet under the eaves for air circulation and doorways of considerable size to get their machines into and out of the workshop. One main doorway at the back of the factory faces directly on to Lim Seng and Haji Ahmad Rice Mills, and there are side doorways facing the Selangor Rice Mill on one side and opening, on the other side, on to a large field which is part of the plaintiff's premises and on which they park and demonstrate their machines. At the far right-hand side of the plaintiffs' premises along their boundary with the Selangor Rice Mill and near the corner of the three rice mills is a house for a watchman or storekeeper.

The plaintiffs carry on business in the sale of heavy earth-moving equipment and general construction equipment such as heavy tractors, industrial fork-lift trucks and allied machinery. In their workshop they part-assemble the new machines on their arrival and provide special technical facilities for repairs and complete overhauls of machines. In the course of their business it is necessary for them to store diesel fuels and oils and other lubricants which are inflammable.

The defendants and the other two rice mills in the process of milling padi into rice turn out large quantities of rice husk which they accumulate on their respective premises in the vicinity of and exposed to the plaintiffs' premises. The matters complained of in this case arise in consequence of the formation of large dumps or heaps of rice husk on the premises of the three rice mills. The Selangor Rice Mill, however, has put up a store building all along their boundary with the plaintiffs' premises so as to provide an effective screen against their rice husk dump, and the court is not concerned in these proceedings with any complaints which the plaintiffs might have against Lim Seng Rice Mill. The case against the defendants in a nutshell is that, as a result of their accumulating rice husks in large dumps and burning them on their premises, dust, rice husks, smoke and ashes are carried by the prevailing winds on to the plaintiffs' premises, thereby causing a nuisance.

The history of the nuisance complained of starts from 14th July, 1958 when eighteen local residents sent a letter to the health officer, Petaling Jaya Authority complaining that the burning of padi husks at all hours of the day by the defendants was causing a fine dust to be carried in the air, thereby endangering the health of the people in the adjacent residential area. The letter went on to say that the burnt husk in the form of ash settled on all household effects and on food being consumed at the dining tables. Following upon the receipt of this complaint a notice requiring abatement of the nuisance was issued by the administrator, Petaling Jaya on 24th July, 1958.

Nonetheless, the nuisance continued to exist and letters continued to be sent by the residents of Petaling Jaya complaining about it. At least three such letters were sent in the year 1960, one of them being from the Federal Paint Factory. The first of such letters dated 29th June, 1960 was signed by 65 local residents. On 16th August, 1960 the administrator issued a second notice requiring the defendants

> "after burning the padi husks to immediately dispose it and to leave no accumulation of padi husks or ashes which would be blown all over".

The notice was followed up by a letter dated 28th October, 1960 in which it was stated that the padi husk if burnt could still cause a nuisance. The permission to burn the husk was therefore withdrawn and the defendants were required to remove it daily from the site and dispose of it in a pond marked on the plan attached.

On 7th December, 1961 the administrator wrote a letter to the defendants stating,

> "I regret to note that you have again allowed padi husk to accumulate at your rice mill in spite of your assurance that you would dispose it in the area allotted to you for that purpose till a permanent solution is arrived at. I would therefore request you to dispose off the padi husk and not to allow it to accumulate at your rice mill."

Similar letters were sent on 12th May, 1962 and on 17th July, 1962. At a meeting, at which representatives of the three mills were present, held on 3rd August, 1962 it was decided that the padi husk was to be dumped daily into a mining pool.

On 18th June, 1963 yet another letter was sent to the defendants by the administrator to say:

"I have received numerous complaints from the neighbouring factories of nuisance and possibly damage to machinery being caused by ashes blown over from the burnt padi husk from your factory premises. This is to inform you that unless you stop the burning of padi husk immediately at your factory premises, I will be compelled to take legal action against you."

The plaintiffs themselves complained about the nuisance to the health officer, Petaling Jaya Development Corporation by their letter dated 7th June, 1963. Their solicitors wrote about it to the defendants on 11th July, 1963. The defendants' solicitors replied to the plaintiffs' solicitors on 17th July, 1963 as follows:—

"1. Our clients instruct us to state that they have been burning padi husk dumped from their factory on their vacant land contiguous to their factory and they further state that the use of their vacant land in the circumstances is a reasonable user.

2. It should, perhaps, be explained that in the first place the Petaling Jaya Authority intended the area in which our clients' land is situated for the carrying out of the milling industry and in fact your clients' predecessors in title in respect of your clients' land used or intended the same to be used as a rice mill.

3. In the process of milling padi into rice, the husk of the padi is bound to accumulate into a heap of padi husk as would be the case in every mill. There is no method by which it is ever possible to prevent the blowing of the husk by an occasional strong breeze or wind.

4. Our clients have burnt the husk and when reduced to ashes they are removed by lorries to be dumped in another place, and we are instructed to state that this removal takes place almost daily.

5. As milling is done almost every day the heap of padi husk will be continuously burnt, but, the burning husk has never developed into a fire to endanger the neighbouring premises, and our clients further instruct us to state that every precaution has been taken to prevent such a danger.

6. Our clients deny that they caused a nuisance, and we are instructed to state that they will resist any action that your clients may decide to take in this matter."

On 12th August, 1963 the administrator, Petaling Jaya wrote to the plaintiffs' solicitors:

"I have to inform you that no action is being taken against Haji Ahmad Rice Mill Ltd. and I would prefer that you institute the necessary action on behalf of Pacific Engineering Ltd."

The plaintiffs commenced this action on 14th October, 1963.

The plaintiffs' sales director, Mr. Humpston (P.W.3), gave evidence at the trial to say that his company have experienced difficulties because of rice husks being blown towards their premises. This affects primarily their technical workshop personnel and even necessitates their having to tie handkerchiefs round their mouths and noses in an attempt to prevent inhaling the dust. They have to close their rear access door when the husks are blowing in their direction, but this cuts out light and reduces ventilation. Dust adheres to the paint and working parts of the machines which are kept on display as part of their advertisement. This involves additional labour costs to clean and maintain the machines. There is also danger from fires immediately adjoining their premises. Two fires in fact took place in 1963 when the lallang along their boundary line with the Selangor Rice Mill caught fire, although no embers from the defendants' dumps have ever caused any fire on their premises. The blowing of the rice husk from the defendants' mill does not happen daily as it depends upon the prevailing wind and the height of the piles of rice husk. The height of the dumps is not maintained at any specific level, and there are times when there are no dumps. The worst period is when the weather is dry and the prevailing wind is in their direction and the burning has reached the outer portion of the dump, especially when the husk is being dumped at the same time from the chute.

The evidence of Mr. Hansen (P.W.4), the workshop manager, is that they get a lot of ash and dust into their workshop. He has had complaints from his workmen about dust and ashes getting lodged in their eyes. As his office at the back of the workshop is not air-conditioned, he has to keep the windows open. At times he has to close them because of the smell and dust. The ashes and dust cause him discomfort at certain times and there is nothing he can do to avoid it. He has been affected by particles in his eyes once. It is when they are painting that their work is disorganised by the dust and ashes. Normally they paint outside, but when there is wind bringing dust along with it they have to paint inside the workshop and the men have to wear masks because of overspray and fumes from the paint. When painting work is being done inside the workshop they cannot carry out any repairs. All the machinery imported has to be painted on arrival because of damage in the shipping.

As regards danger to health, Dr. Visvanathan (P.W.2) has given evidence to say that rice husk, being fibrous in nature, can pick up silica from the soil. When rice husk is burnt, the silica is oxidised and becomes silicates. Silica can be a potential danger to health because it causes a disease called silicosis. Dust containing silica can give rise to silicosis depending upon the concentration of dust and the period of exposure to it. The disease manifests itself after a period ranging from five to eight years. Apart from causing silicosis, the dust from the rice husk causes irritation of the respiratory tract which will manifest itself in the form of sore throat. It can cause irritation to the eyes and produce coughing if inhaled. A fairly high percentage of silicates in the husk will be necessary to cause

silicosis and there must be constant and sustained exposure to it.

The evidence on behalf of the defendants by their managing director, Mr. Fun Seng Boon, is that his company mills about a thousand pikuls of padi a day which produces about 250 pikuls of husk. The husk comes out through a chute and is dumped in their court yard. This is the standard method of milling padi into rice in all the States of Malaya. They allow the husk to heap up and then remove it. Even if there is a strong wind, the husk does not fly but slides down from the top of the heap to the bottom part. Moreover, rice husk in a heap becomes compact with its weight. No part of the plaintiffs' building is exposed to their premises except for the three side doors of their workshop, and the back door of the workshop faces Lim Seng Rice Mill. Their land has no common boundary with the plaintiffs' land because there is a railway reserve in between, and it is situate at an angle in relation to the plaintiffs' land. The area which they use for dumping rice husk is 4 feet below their factory level, and it is immediately behind the factory and to the rear of their godown. Their factory and the godown almost touch each other at an angle of 90 degrees, so that they lessen the force of any wind blowing towards the rice husk heaps. They do not allow rice husk heaps to build up to unmanageable proportions as they maintain a tractor and a lorry for the special purposes of removing the rice husks. Their process of milling is such that when the husk comes out it is free from dust, although it contains some powdery substance known as cargo bran. If any dust or any other type of bran flies at all, it flies within the factory itself.

Mr. Fun Seng Boon has stated further that originally they used to burn the rice husk on their premises. The burning did not produce much smoke. The smoke rose perpendicularly, and it would blow upwards even if there was wind. Even if the wind was blowing in the direction of the plaintiffs' property, the smoke was not so much that it did not disperse before reaching the plaintiffs' premises. There was no fire risk as as their dump was nearer to their factory than to the plaintiffs' land. They used to sprinkle water over the husk to stop the ash from flying about whenever the wind was about to blow, and they stopped burning rice husks in August or September, 1963.

An employee of the defendant company named Tan Chong Kooi (D.W.2) has given evidence to say that he has been working in rice mills for the last 20 years and that he is conversant with the disposal of rice husk as practised by the rice millers in this country. According to him, all the rice millers dispose of their rice husk by burning and this was the method adopted by the various rice mills for whom he had worked previously. He has been in and out of rice mills for 20 years, and to his knowledge none of the workers has suffered from any lung disease. The only other evidence produced by the defendants is the evidence of their lorry driver as regards the regular removal of the rice husk from the dumps and its disposal in a mining pool nearby.

On the evidence before me it is abundantly clear that by accumulating rice husks in large dumps and burning them on their premises the defendants created a public nuisance. Notices were issued against them twice to abate the nuisance. Several letters were written to them about such nuisance by the administrator, Petaling Jaya Authority. At no time did they write back to say that they were not guilty of causing a nuisance. Indeed, there was no denial of nuisance until their solicitors wrote to the plaintiffs' solicitors.

I do not accept the evidence of their managing director that they stopped burning the rice husks in July or August, 1963, because in his letter dated 24th July, 1964 addressed to the defendants the Chairman, Town Board, Petaling Jaya was still speaking of numerous complaints from neighbouring factories and houses of nuisance caused by ashes blown over from the burnt padi husk from their factory premises. It was pointed out to the defendants in that letter that it was observed that they had stopped dumping padi husks into the mining pool specially constructed for this purpose and had started burning padi husks at the premises. These allegations were never refuted by the defendants. The letter went on to warn them that unless they stopped burning padi husks at their factory premises immediately, their licence for storing and milling of rice would be withdrawn.

On 25th September, 1964 the chairman wrote to them that the entire accumulation of ashes on their premises should be completely removed within one month, failing which their licence for storing and milling would be cancelled. They were also told that padi husks whether in small heaps or large heaps should not be burnt on the premises under any circumstances and the padi husks should be removed regularly for disposal in the mining pool.

What is actionable nuisance is summed up in *Clerk and Lindsell* on Torts (12th Edition) in paragraphs 1211 and 1213 as follows:—

> "The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. . . . Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land, when it is a private nuisance."

"The acts which constitute public nuisances are all of them unlawful acts. In private nuisance, on the other hand, the acts constituting the nuisance are not necessarily or usually unlawful. A private nuisance may be and usually is caused by a person doing on his own land something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extend to the land of his neighbour by (1) causing an encroachment on his neighbour's land, when it closely resembles trespass, (2) causing physical damage to his neighbour's land or buildings or works or vegetation upon it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land."

It is clear from the authorities that a person injured by a nuisance may bring an action and claim damages for the injury alone or together with a claim for an injunction. The power of the court in Selangor to grant an injunction is contained in section 52 of the Specific Relief (Malay States) Ordinance, 1951 which states, *inter alia,*

"When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely— . . . (c) where the invasion is such that pecuniary compensation would not afford adequate relief; (d) where it is probable that pecuniary compensation cannot be got for the invasion; (e) where the injunction is necessary to prevent a multiplicity of judicial proceedings."

Section 54(i) of the same Ordinance provides that an injunction cannot be granted "when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust".

It was contended for the defendants by way of preliminary objection that section 54(i) of the Ordinance precludes the granting of an injunction where the matters complained of constitute a public nuisance. This contention is based on the ground that where the acts alleged against the defendants constitute a public nuisance the only remedies open to the injured party lie in sections 77 to 86 of the Town Boards Enactment (Cap. 137) or sections 89 to 97 of the Criminal Procedure Code (Cap. 6) or certain sections of the Penal Code. In my judgment this contention of the defendants must fail for at least two reasons.

In the first place, there is no law in this country, as there is in England, which requires civil proceedings in respect of public nuisance to be brought with the sanction and in the name of the Attorney-General. And even in England a private individual can maintain an action if he suffers particular damage over and beyond the general inconvenience and injury suffered by the public, and the damage he sustains is direct and consequential: *Vanderpant* v. *Mayfair Hotel Co. Ltd.*[1] As was stated by Lord Romer in *Sedleigh-Denfield* v. *O'Callaghan,*[2]

"It is well settled that a private individual, who suffers damage from a public nuisance greater than that sustained by the public in general, is entitled to sue in respect of that damage. So far as he is concerned the nuisance is a private nuisance; and his rights and remedies in respect of both kinds of nuisance are to be ascertained on precisely the same footing."

In the second place, I can think of no other usual mode of proceeding as between the parties to this action by which the plaintiffs can certainly obtain an equally efficacious relief. In the case of any proceeding under the Town Boards Enactment the only step which the plaintiffs can take is to complain to the chairman after which the future conduct of any proceeding is taken completely out of their hands. There is nothing more which the plaintiffs can do, and it is extremely doubtful whether mandamus will lie against the chairman to compel him to take steps to abate the nuisance. Approximately the same position arises under the Criminal Procedure Code except that in that case he has to complain to a magistrate. Section 54(i) of the Ordinance clearly contemplates a relief which may be open to the party complaining directly against the party complained against.

One of the defences raised relates to delay and acquiescence on the part of the plaintiffs. This is founded on the fact that the plaintiffs did not write to the defendants until July 1963. Neither acquiescence nor delay is tenable in this case. There is no form of acquiescence suggested and nothing in the way of acquiescence has been proved. As regards delay, nuisance, being a tort of a continuous nature, gives rise to a fresh cause of action as often as fresh damage is caused. If the nuisance has not been continued, an action will be statute-barred if it is based upon damage which was caused more than six years before the action is commenced. There is clear evidence in this case of nuisance of a continuous nature.

I can also find no merit in any of the other defences raised. The fact that the best known means have been taken to reduce or prevent the nuisance complained of or that the cause of nuisance is the exercise of a business or trade in a reasonable and proper manner is no answer to an action based on nuisance: *Vanderpant* v. *Mayfair Hotel Co. Ltd.*[1]. The fact that the nuisance existed before the plaintiffs occupied their premises, so that they came to the nuisance, does not prevent them from recovering damages or obtaining an injunction: *Tipping* v. *St. Helens Smelting Company.*[3] If a nuisance is constituted, it cannot be justified on the ground that the place is a suitable or convenient one. It is immaterial that there are other people in the neighbourhood causing a nuisance, if the one complained of is a material addition thereto. Where the collective effect of the independent acts of others is a nuisance, the court will restrain each person contributing to the nuisance, although the act of any one of them would only result in an appreciable inconvenience or damage and be insufficient in itself to constitute a nuisance: *Lambton* v. *Mellish, Lambton* v. *Cox.*[4]

The two main heads of nuisance complained of in this case are injury to property and interference with personal comfort. The plaintiffs have produced ample evidence to show that smoke, ashes, dust and rice husks which emanate from the defendants' premises cause discomfort to their employees and injury to their property. They have indeed produced evidence to show that the nuisance complained of is injurious to health, although it is not necessary to constitute a private nuisance that the acts or state of things complained of should be noxious in the sense of being injurious to health. All that they are required to show is that there is material interference with the ordinary comfort and convenience of life. To my mind, smoke, ashes, dust and rice husks, either together or singly, which materially interfere with the physical comfort of human existence, constitute a nuisance in law.

Where an absolute legal right of the plaintiff to the peaceful enjoyment of his property is infringed, he is entitled to nominal damages even though no actual perceptible damage is proved: for in such a case the law presumes damage. As regards damage to property, the plaintiffs have proved that they have had to incur about $200 a month as additional labour costs by their having to clean all the dust, ashes and rice husks which get deposited on their machines. Thus, the plaintiffs have made out a case both for an injunction to restrain them from committing the nuisance and for damages for the injury done.

It has been suggested that the defendants should be ordered to pay all these damages even though they are not wholly responsible for the nuisance. Having visited the scene during the hearing, I am satisfied that from the time of the filing of the action Lim Seng Rice Mill, being directly behind the plaintiffs' premises, has contributed greatly to the nuisance complained of. The defendants and Lim Seng Rice Mill cannot be treated as joint tort-feasors, as each is responsible for its own actions and there is no proof that they have acted in collusion. In such a case each of the contributors is liable for a nuisance and for his own proportion of the total damage. I would make the defendants responsible for a little more than a quarter of the total damages and award a sum of $1,500 against them.

The next question I have to consider is whether an injunction to restrain the defendants from burning the rice husks should be granted in view of the fact that at some time between the writ and the trial this nuisance has been abated. *Prima facie,* if a nuisance is shown to have existed at the time the writ was issued, the plaintiff is entitled to an injunction. *Rapier* v. *London Tramways Company* [5] is an authority for the proposition that the court may grant an injunction even though the wrongful acts complained of had already ceased. However, if between the writ and the trial the nuisance has been abated, the court may stay its hand and merely give the plaintiffs leave to apply in the action for an injunction if the trouble should recur, but an important consideration is the past conduct of the defendants and their attitude from the outset to the very reasonable complaints which were brought to their attention, and an attitude of indifference to complaints as tending to show irresponsibility is not an irrelevant consideration where the granting of an injunction is concerned. I am compelled to say that in this case the defendants paid scant attention to the complaints of the local residents or to the representations of the local authorities before the writ was issued. They were dilatory in taking the necessary steps recommended for the disposal of the ashes and the rice husks on their premises. Their attitude seems to have been that what they were doing was a reasonable user of their premises, and it was even suggested that the plaintiffs should put up a high fence on their own premises so as to escape injury from the nuisance complained of. In the circumstances I will make the necessary order to restrain them from burning their rice husks on their property.

I entertain some doubt as to whether the plaintiffs are entitled to an injunction to restrain the defendants from causing any danger from fire to the plaintiffs' premises. In my opinion the correct view is that the mere deposit on one's premises of something which is likely to catch fire does not in itself constitute a nuisance. If a fire starts on the premises and spreads to the adjoining property, the basis of liability in my opinion will not be on the ground of nuisance. The order for injunction will therefore be as prayed in paragraph 9(a) and (c) of the statement of the claim. There will also be judgment for $1,500 by way of damages and costs.

Injunction granted.

Solicitors: *Skrine & Co.; Eugene Lye & Co.*

DEMON v. PUBLIC PROSECUTOR

[A.Cr.J. (Silke J.) April 13, 1966]

[Jesselton — Criminal Appeal No. 3 of 1966]

Road Traffic — Charge of driving vehicle not covered by third party insurance — Proof of offence — Excess passengers carried in bus — Road Traffic (Third Party Insurance) Ordinance (Cap 129), ss. 3 & 7.

The accused was charged and convicted of an offence of carrying 31 passengers in a bus while the vehicle was licensed to carry only 30. He was also charged with the offence of driving a vehicle not covered by third party insurance. The accused's plea was recorded as one of guilty, and the prosecution in the course of its statement of the facts said he was licensed to carry only 30 passengers and that as a result of this he was not covered by third party insurance.